Supreme Court, U.S.
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No. 05-593

In The Supreme Court of the United States

PAT OSBORN, PETITIONER,

v.

BARRY HALEY, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS, GAYE VERDI f/k/a GAYE LUBER AND LAND BETWEEN THE LAKES ASSOCIATION, INC.

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QUESTIONS PRESENTED

1. Whether the Attorney General may concede hypothetically the plaintiff's factual allegations, in certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," within the meaning of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2679(d).

2. Whether the Westfall Act's provision that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court, 28 U.S.C. § 2679(d)(2), means that a district court must retain jurisdiction over the removed suit, even if the court ultimately overturns the Attorney General's scope-of-employment certification and declines to substitute the United States as the defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29(c), Respondent Land Between the Lakes Association, Inc., states that it is not the subsidiary of any other corporate entity, nor does any publicly held corporation own more than ten percent (10%) of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1a-11a) is reported at 422 F.3d 359 (6th Cir. 2005). The memorandum and order of the district court denying the motions for substitution and dismissal filed by the United States (Pet. App. C and D at 17a-25a) and the opinion and order denying reconsideration of that order (Pet. App. B at 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered September 8, 2005. The petition for a writ of certiorari was filed November 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves interpretation of the Federal Employees Liability Reform and Tort Compensation Act of 1988, also known as the Westfall Act, Pub. L. No. 100-694, 28 U.S.C. § 2679(d), the full text of which appears as App. E to the Petition.

STATEMENT OF THE CASE

The United States has not conceded that its employee's alleged conduct was outside the scope of his employment if it occurred.

The Petition rests upon a mistaken premise, the fallacy of which severely undercuts Petitioner's reasons

why the Court should review this case. Petitioner asserts that the United States conceded that its employee Barry Haley's alleged conduct was outside the scope of his federal employment, so that the only question in dispute is whether these allegations are true. *See* Pet. at 2, 3, 6, 10, 16, 18, 19. However, no such concession is found in the district court record.

To the contrary, the United States specifically denied the allegations that Haley acted outside the scope of his employment. *Compare* App. A, Compl. at ¶¶ 29, 34, and 41 *with* App. B, United States' Answer at ¶¶ 14 (denying ¶ 29 of the Complaint), 16 (denying ¶ 34 of the Complaint), and 19 (denying ¶ 41 of the Complaint). The Answer contains no "concession" that Haley's alleged acts would have been outside the scope of his employment if they occurred.

Instead, the Acting United States Attorney certified that Barry Haley was acting within the scope of his employment at the time of the conduct alleged in the Complaint. *See* App. C, Certification. The Certification contained no further explanation, and no concession that Haley's alleged actions would have been outside the scope of his employment even if they had occurred. *Id.*

Accordingly, the United States moved to dismiss Osborn's Complaint, citing the Acting U.S. Attorney's Certification that Haley acted within the scope of his employment, and the Petitioner's need to exhaust her administrative remedies under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* before suing the United States. *See* App. D, United States' Mot. to Dismiss. Like the United States' Answer, the Motion contains no concession that

Haley's alleged acts would have been outside the scope of his employment if they occurred. *See id.*

Osborn responded to the Motion by arguing that the following alleged facts showed that Haley acted outside the scope of his employment: (1) the Complaint alleges that Haley "induced, persuaded, or coerced defendant Gaye Luber [now Verdi] to discharge plaintiff of her job . . . "; (2) a Memorandum of Understanding between the U.S. Forest Service and the Land Between the Lakes Association, Inc. ("LBLA") stated that Forest Service employees would not participate in any LBLA decision concerning "hiring or firing" LBLA employees; and (3) Robert Kuenzli, a Department of Labor investigator, stated in a letter that Petitioner was fired because Kuenzli called Haley. *See* Petitioner's Resp. to United States' Mot. to Dismiss at 4, and Exs. thereto. However, the same letter described a meeting wherein Osborn drew a "big laugh" by criticizing Haley in front of nearly 80 people, resulting in her boss's request that she apologize to Haley; all before Kuenzli ever contacted Haley. App. E., Ex. C to Osborn's Resp. The letter also states that Osborn told Kuenzli that her boss, Tamara Newkum, told her that Haley had demanded she terminate Osborn for insubordination. *Id.* Further, when Kuenzli asked Osborn what it was that caused the insubordination, "she explained that it was the comment she made at the staff meeting to Mr. Haley." *Id.* Kuenzli's own account indicates Osborn was fired because of the comment made at the staff meeting, before Kuenzli's phone call; and that Osborn understood this.

In reply, the United States pointed out that the Petitioner had never alleged any facts showing that Haley acted outside the scope of his employment; rather, the Complaint (at ¶ 6) stated that Haley was "employed by the

Forest Service at all times related to the complaint." United States' Reply at 3. The allegations that Haley "wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff" were merely conclusory, and presented no *facts* supporting the allegation that Haley acted outside the scope of his employment; i.e., there were no specific facts or allegations that Haley even attempted to affect Osborn's employment. *Id.* at 4. Nowhere in its Reply did the Government concede that Haley's alleged acts were outside the scope of his employment if they occurred. Instead, the Reply merely pointed out the Petitioner's failure to meet her burden of proof on the question of scope; a burden which shifts to the plaintiff once the Certification is filed. *Id.*, p. 2 (citing several circuit court rulings).

When the District Court then issued its Memorandum and Order overruling the Certification, the court mistakenly concluded that

> . . . the United States does not deny any of the factual allegations contained in Ms. Osborn's complaint, i.e., that Mr. Haley talked with Ms. Luber regarding Ms. Osborn's complaint to the Department of Labor. Instead, the United States only disputes her legal conclusion that Mr. Haley was acting in his individual capacity during the relevant times.

Pet. App. D at 22a. In truth, the United States could not have literally denied such a specific factual allegation, because Osborn never made it. The United States did, however, point out the absence of such a factual allegation, and specifically denied Osborn's *conclusory* allegation that Haley induced her termination – in addition to denying that Haley acted outside the scope of his employment.

App. A, United States' Answer at ¶ 19 (denying the allegations in ¶ 41 of Osborn's Complaint). Nonetheless, the district court concluded that no evidentiary hearing was needed, because there was no conflicting evidence as to a material fact. *See* Pet. App. D at 22a.

In its Motion to Reconsider, the United States reminded the court that it had indeed vigorously contested Petitioner's allegations, and further attached affidavits from the individual defendants stating that they had never discussed Osborn's Veteran's Preference inquiry. Thus, the United States was compelled to supplement the record with specific, sworn statements refuting allegations that the Petitioner never specifically made. In addition, assuming "for the sake of argument only" that Haley and Luber "interacted regarding plaintiff's employment," the United States argued that Haley's alleged conduct in causing Osborn's firing could be construed as furthering his employer's goal of "partnering with competent contract employees in a healthy and productive work environment . . . " *Id.* Thus, if the previous record had left any doubt that the United States was *not* conceding that Osborn's conclusory allegation that Haley caused her firing described conduct outside the scope of his employment, this Motion removed it.

In responding to the United States' Motion to Reconsider, Osborn merely repeated her allegations that Verdi met with her to discuss problems with her employment on the same day that Haley was informed Osborn had filed a complaint with the Department of Labor, and that she was terminated by Verdi two days later. Again, she failed to allege *any* contacts between Haley and Luber regarding her employment.

Finally, in its order denying the United States' Motion to Reconsider, the district court accepted that it is "highly unlikely," in light of Haley's affidavit, that Osborn could develop proof demonstrating that Haley "interacted with Verdi regarding Osborn's employment." Pet. App. B at 14a. Nevertheless, the district court further explained that it could not decide the basic question of whether the communication occurred at all, and could not consider the United States' alternative legal argument, i.e., the argument that having Osborn fired could have benefited Haley's employer and been within the scope of his employment; as such alternative arguments would contradict Haley's declaration under oath. *Id.* Thus, having previously overruled the Certification without a hearing because the United States supposedly failed to deny the underlying "allegations," the district court later held that it must sustain its ruling without a hearing because the United States *did* come forward with proof refuting the underlying "allegations." Further, the district court simply declined to consider the legal argument that a Forest Service representative could conceivably act within the scope of his employment in attempting to influence a contractor to provide cooperative employees. Inherent in this rationale is the court's conclusion that Haley's involvement in Osborn's termination for *any* reason, whether related to the Department of Labor inquiry or otherwise, would have necessarily been outside the scope of his employment as a matter of law.

In summary, the United States never conceded that Petitioner's conclusory allegations, or her implied but never-stated underlying factual allegations, described conduct outside the scope of Barry Haley's employment. Instead, the district court prevented the United States from making the alternative legal argument that the

alleged conduct could have been within the scope of employment assuming it had occurred.

It follows that this is not the "simple and stark" case providing an "excellent vehicle" for review, as Petitioner suggests. It is not a case in which the parties agree that the defendant/employee's alleged conduct was necessarily outside the scope of his employment, under any version of the facts which could be presented. Rather, this is a case in which matters relevant to the characterization of the federal employee's alleged conduct have not yet been fully heard.

DISCUSSION

I. There is no "split" among the circuits regarding the district court's need to review the context and characterization of hypothetically-conceded conduct.

Petitioner relies on two cases to show there is a "split" among the circuits on the Attorney General's authority to issue "incident-denying" certifications: *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993); and *McHugh v. Univ. of Vermont*, 966 F.2d 67, 74 (2nd Cir. 1992). However, both involved allegations of sexual harassment, which is rarely, if ever, considered to fall within the scope of employment, and is certainly not the type of conduct intended for immunity protection under the Federal Tort Claims Act. Further, both courts carefully distinguished challenges to the context or characterization of the defendant's alleged conduct, which go beyond simple denials.

In *McHugh*, the defendant was accused of repeatedly joking about the plaintiff's contracting AIDS, stating that

he hoped she'd be able to avoid infection over the summer while he was away at camp; repeatedly suggesting that she must be living with someone; providing his definition of a secretary as a paid whore; and observing that it was "a good day to watch Catholic babies burn." *McHugh*, 966 F.2d at 68. The court ruled that the defendant's alleged conduct was outside the scope of his federal employment, because "it can hardly be contended that Wheeler's alleged conduct furthered the business of the United States government," and because a Vermont trial court decision had squarely held that sexual harassment of one employee by another is outside the scope of employment under Vermont law. *Id.* at 75.

McHugh did hold that the Government "may not deny that acts were within the scope of employment by denying that the acts occurred." *Id.* at 74. However, the court also held:

> The *context* of the alleged act that is relevant to the scope of employment issue is a matter of fact to be determined by the district court, however, *after an appropriate factual hearing. Whenever scope of employment is disputed*, substitution should be made only if the court finds that the alleged acts were within the scope of employment.

Id. at 74-75 (emphasis added).

In *Wood,* the alleged sexual harassment amounted to "assault and battery." *Wood*, 995 F.2d at 1123. The court noted that the House of Representatives' Report of the Act contains language suggesting that it does *not* allow an immunity certificate simply to deny an alleged killing, rape, assault, or some other "outrageous misconduct" that occurs during working hours. *Id.* at 1127. Further, in

Wood, the Government did not deny that the acts would have fallen outside the scope of employment had they occurred. *Id.* at 1124. The court concluded that the Attorney General's certificate cannot deny the basic "incident" charged, but that "the certificate need not accept the plaintiff's version of just *how* it occurred. *Id.* at 1123 (emphasis in original). The court further explained that the basic point of immunity doctrine is to provide a defense for conduct that falls into certain categories, *and that the point of the certificate is to assert a characterization of conduct, namely to claim that a hypothetically conceded incident involved activity that was within the scope of employment. See id.* at 1124-25.

In response to the defendant's concern that "Driver A" who admits negligence would receive immunity while less culpable "Driver B," who denies that any accident occurred, would not, the *Wood* court explained that "it could be so only where Driver A can claim that the underlying incident is job-related, while Driver B cannot make this claim, *even hypothetically for argument's sake.*" *Id.* at 1127 (emphasis added). Addressing the concern that a plaintiff might transform a job-related tort into a non-job-related tort simply by alleging an "off-duty" state of mind, or alleging that a negligent action was carried out intentionally, the court stated:

> Rather, we insist that the certificate assume some kind of *harm-causing incident*, while leaving the Attorney General free to dispute characterization of the incident and subsidiary immunity-related facts. The Second Circuit held the same in *McHugh*. 966 F.2d at 74. Moreover, we previously held that the Attorney General's certificate may contest a plaintiff's incident-describing and incident-characterizing facts and

> that the court may resolve any such factual conflicts, relevant to immunity, prior to trial.

Id. at 1129.

The *Wood* court then gave a very important illustration of this distinction between denying factual allegations and challenging their characterization if hypothetically conceded, based on its earlier holding in *Nasuti v. Scannell*, 906 F. 2d 802 (1st Cir. 1990). The court noted that in *Nasuti*, the plaintiff had alleged that a federal employee intentionally injured him by driving fast in order to jostle him and throw him from side to side in the back of a truck. The court explained: "We assumed that these factual allegations, if true, would have placed Scannell's actions outside the 'scope of his employment' . . . but, we held the immunity certificate valid, pending a pre-trial evidentiary hearing that would resolve the key immunity-related factual dispute, *namely whether Scannell intended to harm Nasuti.*" *Wood*, 995 F.2d at 1129 (citing *Nasuti*, 906 F.2d at 808) (emphasis added).

Remand of this case to the district court for a hearing on the scope of employment issue is consistent with *McHugh* and *Wood*. Unlike in those cases, the Petitioner has not alleged conduct, such as sexual assault or rape, which is clearly not entitled to the protection of immunity if it occurred, and would clearly be beyond the scope of employment under state law, under any version of events. Instead, Osborn alleged torts which the district court correctly ruled are not actionable if undertaken with a "purpose to serve the employer." Pet. App. D at 23a (citing *American Gen. Life & Accident Ins. Co. v. Hall*, 74 S.W.3d 688, 692 (Ky. 2003)). Further, the United States articulated motives that could have justified Haley's alleged

attempt to influence Osborn's employment as serving his employer; and Osborn herself put forth documentation that she was fired because she engaged in public ridicule of a Forest Service official as a contractor's employee, pointedly undermining that official's (Haley's) attempt to address the quality of communications between the two organizations. *See* App. E, Ex. C to Resp. This is hardly analogous to a case in which the only matter in dispute is whether rape, assault, or harassment either did or did not occur.

Additionally, the instant matter does not involve a situation in which the Government has merely denied the factual "allegations." Instead, the Government attempted to put the Petitioner to her proof, and then argued that even if Petitioner's allegations that Haley interfered with her employment were hypothetically true, Haley was entitled to a hearing to determine his intent or motive. Consistent with *Wood* and *Nasuti*, *supra*, Haley should have been given the opportunity to contest Osborn's "incident-describing" and "incident-characterizing" allegations, which were merely conclusory and did not even allege specific conduct. Paraphrasing the language of *McHugh*, *supra*, the district court should have considered all facts and arguments relevant to the *context* of Haley's alleged conduct and Osborn's termination, as Haley's alleged conduct was not necessarily inconsistent with a legitimate business purpose.[1]

[1] Indeed, under Kentucky law, even criminal assault has been deemed within the scope of employment, when intended to further the employer's purpose. *Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005).

Finally, Petitioner's own Complaint supports the argument that the claims against Haley described conduct within the scope of his employment. Plaintiff accused defendant Verdi of discharging her in violation of public policy; conspiring to wrongfully discharge plaintiff; conspiring to interfere with plaintiff's employment relationship; and outrageous conduct; all alleged to have been carried out in a "malicious, oppressive, and intentional manner in order to injure and damage plaintiff." *See* App. A, Compl. In each instance, Osborn alleged that Verdi acted within the scope of her employment as Executive Director of the defendant LBLA while performing these acts. *Id.*, ¶¶ 24, 26, 37, 38, 44, 45, 52, 61, and 63. It appears plaintiff pled her claims cleverly, in hopes of keeping Verdi's employer in the lawsuit, while keeping Haley's employer out. A true "bright-line" case, such as one alleging rape or sexual assault, could not accommodate such dual characterizations.

II. Since legal questions regarding scope of employment remain, this is not an ideal case through which to address any conflict between Article III and the clear statutory language making the Attorney General's certification conclusive for purposes of removal.

The fact that legal issues remain relevant to scope of employment also undermines Petitioner's second argument. Petitioner alleges that this Court should review the Sixth Circuit's directive that the case must remain in federal court, even if the district court determines after a hearing that certification was improper. Specifically, Petitioner acknowledges that in cases where the scope-of-employment question is subject to judicial review, although

"there may no longer be a federal question once the federal employee is re-substituted as defendant, . . . there *was* a non-frivolous federal question . . . when the case was removed to federal court." Pet. at 15-16, citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) at 435 (plurality opinion). Thus, Petitioner continues, it can fairly be argued further that such a case "raises a question of substantive federal law at the very outset," and therefore "clearly arises under federal law, as that term is used in Art. III." Pet. at 16 ((quoting *Lamagno*) (quoting *Berlinden B.V. v. Central Bank of Nigeria*, 461 U.S.480, 493 (1983))). Petitioner then attempts to contrast the present case as one involving no dispute for the district court to resolve other than whether the alleged incident did in fact occur. *Id.* at 16. As demonstrated above, this is not correct, which removes the Article III concerns Petitioner attempts to raise. Under Petitioner's own analysis, if this Court concludes that a "colorable" federal question remains regarding the scope of Haley's employment, then this case is not an "ideal vehicle" for the Court to examine the constitutionality of the clear language of 28 U.S.C. § 2679(b)(2), which renders the Attorney General's certification conclusive for purposes of removal.

The split among the circuits on this question of remand is grounded squarely in constitutional concerns. Petitioner cites *Nasuti v. Scannell*, 906 F.2d 802, 814 (1st Cir. 1990), and *Haddon v. United States*, 68 F.3d 1420, 1427 (D.C. Cir. 1995), for the proposition that a district court cannot retain jurisdiction after concluding that the defendant acted outside the scope of his employment. Both courts cited constitutional concerns.

Further, *Nasuti* pre-dates the Supreme Court's opinion in *Lamagno, supra*, in which (as the United States

Response Brief points out) eight justices concluded that the plain language of 28 U.S.C. § 2679(b)(2) precludes remand to the state court if the federal district court overturns the Attorney General's certification. *See* 515 U.S. at 434, 440 (the dissent stating "there is nothing equivocal about the Act's provisions . . . "). Nevertheless, the four-Justice dissent concluded that remand after denial of substitution would exceed the Court's Article III jurisdiction. *Id.* at 441. The four-Justice plurality concluded that the Attorney General's removal of the case on his certification raises significant and substantive federal questions at the outset, so that it is consistent with Article III for the court to retain jurisdiction "once it has invested time and resources on the initial scope-of-employment contest." *Id.* at 436. Justice O'Conner declined to address the Article III question because it was not presented in the case before the Court. *Id.* at 437.

In summary, the clarity of the statute's language prohibiting remand is not in dispute. The only "split" among the Justices, the courts, and even these parties regarding remand after denial of substitution, concerns the applicability of Article III to such a procedure. These parties further appear to agree that this is *not* an ideal case for the Court to review the Article III question, *if* the Court concludes that colorable federal questions remain to be decided by the district court. Finally, the parties have never briefed the merits of the Article III question in these proceedings at any level, and accordingly the Sixth Circuit did not directly address the subject in its Opinion.

CONCLUSION

For the reasons stated above, these Respondents cannot agree with the United States that the Court should review the Petitioner's first issue, which posits an "incident-denying" certification, because this is not merely an "incident-denying" case. Rather, this case involves the district court's failure to determine facts and hear legal arguments relative to the characterization and effect of the defendant's alleged conduct, under Kentucky law defining "scope of employment."

These Respondents further contend the Court should not review Petitioner's second question either, because retaining federal jurisdiction under these circumstances would not raise unavoidable constitutional concerns. Rather, the "ideal vehicle" for resolving such issues would be a case of rape, assault, or harassment, not colorably within the scope of employment under applicable state law, so that no federal question would arguably be raised from the outset. However, if the Court undertakes review of the district court's denial of substitution, then these Respondents must reluctantly agree with the United States that, for practical reasons, the Court should review the issue of remand as well.

Respectfully submitted,

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March 2006

APPENDIX A

COMMONWEALTH OF KENTUCKY
TRIGG CIRCUIT COURT
CIVIL ACTION NO. 03-CI-00119

Pat Osborn — PLAINTIFF

v.

Barry Haley, individually — DEFENDANTS
Gaye Luber
Land Between The Lakes Association, Inc.

(Filed Jun. 23, 2003)

Comes now the plaintiff, Pat Osborn, and for her complaint herein states as follows:

PARTIES AND JURISDICTION

1. Plaintiff, Pat Osborn, is a resident of Calloway County, Kentucky.

2. Defendant, Barry Haley, is believed to be a resident of Marshall County, Kentucky.

3. Defendant, Gaye Luber, is a resident of Marshall County, Kentucky.

4. Defendant, Land Between The Lakes Association, Inc. (hereinafter referred to as "LBLA") is a Kentucky corporation with its principal place of business located in Trigg County, Kentucky.

5. The acts of the defendants that are the basis of this complaint occurred in Trigg County, Kentucky.

6. At all times relevant to this complaint, defendant Barry Haley was employed as Business Manager by USDA Forest Service, Land Between The Lakes National Recreation Area (LBL NRA, hereinafter referred to as "U.S. Forest Service"), whose principal place of business is located at 100 Van Morgan Drive, Golden Pond, Trigg County, Kentucky.

7. At all times relevant to this complaint, defendant Gaye Luber was employed as Executive Director by defendant LBLA, whose principal place of business is located at 345 Maintenance Road, Golden Pond, Trigg County, Kentucky.

8. Plaintiff was employed as Volunteer Coordinator by defendant LBLA from January 2001 until her discharge on June 19, 2002. Plaintiff worked at defendant LBLA's principal place of business located at 345 Maintenance Road, Golden Pond, Trigg County, Kentucky.

9. LBLA is a corporate contractor to the U.S. Forest service. LBLA provides staff for gift shops, visitor centers, and interpretive areas. LBLA receives more than one-half of its income from the U.S. Forest Service.

10. On or near February 7, 2002, and again upon re-advertisement of the position on or near April 19, 2002, plaintiff applied for an advertised position of Contract Specialist Trainee with the U.S. Forest Service. The chosen applicant would be trained out of the U.S. Forest Service office located in Trigg County, Kentucky.

11. On or near May 20, 2002, at a joint meeting of U.S. Forest Service, LBLA, and Brown & Root employees, defendant Barry Haley revealed the name of the person he had selected for the position of Contract Specialist Trainee with the U.S. Forest Service. The person Barry Haley selected was someone other than the plaintiff.

12. Plaintiff is a veteran of the armed services, having served on active duty in the United States Air Force from 1975 until her honorable discharge in 1979. She also served reserve duty from 1981 until her retirement in 1999.

13. As an honorably discharged "5-Point Preference-Eligible" veteran, plaintiff was entitled to receive preference points when being considered for the Contract Specialist Trainee position with the U.S. Forest Service.

14. On or near June 11, 2002, plaintiff filed a written veterans' preference inquiry with the United States Department of Labor in order to determine if she had received the veterans' preference points to which she was entitled when being considered as an applicant for the Contract Specialist Trainee position with the U.S. Forest Service.

15. On June 17, 2002, plaintiff was contacted by telephone by Mr. Robert Kuenzli, an investigator with the United States Department of Labor, and interviewed regarding the written veterans' preference inquiry filed by the plaintiff with the United States Department of Labor.

16. During plaintiff's conversation with Mr. Kuenzli on June 17, 2002, Mr. Kuenzli asked plaintiff whom he could contact at the U.S. Forest Service to determine if plaintiff had received her veterans' preference points when being considered for the position. Plaintiff told Mr. Kuenzli that defendant Barry Haley should be contacted, and provided his phone number. Plaintiff also stated to Mr. Kuenzli that if defendant Barry Haley found out that plaintiff had filed a veterans' preference inquiry with the U.S. Department of Labor, there was a good chance defendant Barry Haley would cause plaintiff to lose her job.

17. On June 17, 2002, after his conversation with plaintiff, Mr. Kuenzli contacted defendant Barry Haley by telephone. While investigating the award of veterans' preference points to applicants in the hiring process for the Contact Specialist Trainee, at defendant Barry Haley's insistence, Mr. Kuenzli acknowledged that plaintiff had filed a written veterans' preference inquiry with the Department of Labor.

18. On June 17, 2002, after Mr. Kuenzli disclosed to defendant Barry Haley that plaintiff had filed a written veterans' preference inquiry with the U.S. Department of Labor, the Executive Director of defendant LBLA, defendant Gaye Luber, summoned plaintiff into her office at LBLA. Defendant Gaye Luber proceeded to ask plaintiff to apologize to defendant Barry Haley for "not being a good Forest Service partner".

19. Plaintiff informed defendant Gaye Luber that Plaintiff had spoken with Mr. Bob Kuenzli of the U.S. Department of Labor earlier that day (June 17, 2002), that plaintiff knew what defendant Gaye Luber wanted plaintiff to apologize for, and that plaintiff would not apologize to Barry Haley for exercising plaintiff's right to inquire as to whether she was given consideration for her veteran status.

20. On June 19, 2002, plaintiff was discharged from her employment with LBLA by defendant Gaye Luber. Plaintiff attempted to telephone Mr. Kuenzli to report that she was being fired for filing the veterans' preference inquiry, but was physically thwarted by defendant Gaye Luber. Plaintiff was ordered to empty her desk of personal belongings in the presence of defendant Gaye Luber. Then plaintiff was escorted from the LBLA premises by defendant Gaye Luber.

FIRST CAUSE OF ACTION
DISCHARGE OF PLAINTIFF IN VIOLATION OF PUBLIC POLICY OF STATE OF KENTUCKY

21. Plaintiff incorporates by reference paragraphs 1-20, inclusive, of this complaint as if fully set forth here.

22. Plaintiff's discharge from her employment with LBLA by its Executive Director, defendant Gaye Luber, was wrongful, in violation of the public policy of the state of Kentucky. Plaintiff's discharge by defendant Gaye Luber, was in retaliation for plaintiff exercising her right to file a formal inquiry request

with the U.S. Department of Labor inquiring as to whether plaintiff was given credit for her veteran status when being considered for the Contract Specialist Trainee position with the U.S. Forest Service.

23. As a direct, foreseeable, and proximate result of plaintiff's wrongful discharge by defendant Gaye Luber, plaintiff has lost and will continue to lose income and benefits, and has suffered and will continue to suffer humiliation, embarrassment, mental and emotional distress all to plaintiff's damage, in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

24. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable for the damages caused to plaintiff by the conduct of defendant Gaye Luber.

25. Because the acts taken toward plaintiff by defendant Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendant Gaye Luber in an amount to punish and make an example of defendant Gaye Luber.

26. Because the malicious, oppressive, and intentional conduct of defendant Gaye Luber was committed when acting within the scope

of her employment as Executive Director of defendant LBLA, her conduct is therefore imputable to LBLA under the doctrine of respondent superior, and plaintiff requests the assessment of punitive damages against defendant LBLA.

SECOND CAUSE OF ACTION
INTERFERENCE WITH
EMPLOYMENT RELATIONSHIP

27. Plaintiff incorporates by reference paragraphs 1-26, inclusive, of this complaint as if fully set forth here.

28. Defendant Barry Haley knew of the employment relationship between plaintiff and defendant, LBLA.

29. On or near June 17, 2002, defendant Barry Haley intentionally interfered with plaintiff's employment relationship with defendant LBLA. Plaintiff incurred the enmity of defendant Barry Haley by filing a veterans' preference inquiry with the U.S. Department of Labor, thereby causing an investigation into Barry Haley's hiring practices at the U.S. Forest Service. Acting outside the scope of his employment, defendant Barry Haley wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff from her job with defendant LBLA in retaliation for plaintiff filing a veterans' preference inquiry.

30. As a direct foreseeable, and proximate result of the conduct of defendant Barry Haley, plaintiff has lost and will continue to lose income and benefits, and has suffered and

will continue to suffer humiliation, embarrassment, mental and emotional distress all to the plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

31. Because the acts taken toward plaintiff by defendant Barry Haley were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendant Barry Haley in an amount to punish and make an example of defendant Barry Haley.

THIRD CAUSE OF ACTION
CONSPIRACY TO WRONGFULLY DISCHARGE PLAINTIFF

32. Plaintiff incorporates by reference paragraphs 1-31, inclusive, of this complaint as if fully set forth here.

33. Commencing on or near June 17, 2002, defendant Barry Haley and defendant Gaye Luber maliciously, without just cause, conspired to bring about plaintiff's discharge from her employment with defendant LBLA in retaliation for plaintiff filing a veterans preference inquiry with the U.S. Department of Labor.

34. In furtherance of the conspiracy:

    a. On or near June 17, 2002, acting outside the scope of his employment, defendant Barry Haley did wrongfully and maliciously induce, persuade, or

coerce defendant Gaye Luber to discharge plaintiff from employment with defendant LBLA.

b. On or near June 19, 2002, acting in concert with defendant Barry Haley, defendant Gaye Luber discharged plaintiff from her job with defendant LBLA in violation of the public policy of the State of Kentucky.

35. As a direct, foreseeable, and proximate result of this conspiracy by defendants Barry Haley and Gaye Luber, plaintiff has lost and will continue to lose income and benefits, has suffered and will continue to suffer humiliation, embarrassment, mental and emotional distress all to plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

36. Because the acts taken toward plaintiff by defendants Barry Haley and Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendants Barry Haley and Gaye Luber in an amount to punish and make an example of defendants Barry Haley and Gaye Luber.

37. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable to plaintiff for the damages

caused to plaintiff by the conduct of defendant Gaye Luber.

38. Because the malicious, oppressive and intentional conduct of defendant Gaye Luber was committed when acting within the scope of her employment as Executive Director of defendant LBLA, plaintiff requests the assessment of punitive damages against defendant LBLA under the doctrine of respondent superior.

FOURTH CAUSE OF ACTION
CONSPIRACY TO INTERFERE WITH PLAINTIFF'S EMPLOYMENT RELATIONSHIP

39. Plaintiff incorporates by reference paragraphs 1-38, inclusive, of this complaint as if fully set forth here.

40. On or near June 17, 2002, defendants Barry Haley and Gaye Luber maliciously, without just cause, conspired to interfere with plaintiff's employment relationship with LBLA and bring about plaintiff's discharge.

41. In furtherance of the conspiracy defendant Barry Haley, acting outside the scope of his employment wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff from her job with LBLA in retaliation for plaintiff filing a veterans' preference inquiry. Acting in concert with defendant Barry Haley, and in furtherance of the conspiracy, defendant Gaye Luber discharged plaintiff from her employment with LBLA.

42. As a direct, foreseeable, and proximate result of this conspiracy by defendants Barry Haley and Gaye Luber, plaintiff has lost and will continue to lose income and benefits, has suffered and will continue to suffer humiliation, embarrassment, mental and emotional distress all to plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

43. Because the acts taken toward plaintiff by defendants Barry Haley and Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendants Barry Haley and Gaye Luber in an amount to punish and make an example of defendant's [sic] Barry Haley and Gaye Luber.

44. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable to plaintiff for the damages caused to plaintiff by the conduct of defendant Gaye Luber.

45. Because the malicious, oppressive and intentional conduct of defendant Gaye Luber was committed when acting within the scope of her employment as Executive Director of LBLA plaintiff requests that punitive damages be assessed against defendant LBLA under the doctrine of respondent superior.

FIFTH CAUSE OF ACTION
OUTRAGEOUS CONDUCT

46. Plaintiff incorporates by reference paragraphs 1-45, inclusive, of this complaint as if fully set forth here.

47. Defendants Barry Haley and Gaye Luber's conduct directed toward plaintiff as described in this complaint was committed in an intentional or reckless manner.

48. Defendants Barry Haley and Gaye Luber's conduct was outrageous and intolerable because it offended generally accepted standards of decency and morality.

49. The conduct of defendants Barry Haley and Gaye Luber, as described in this complaint, was malicious, oppressive and intended to injure plaintiff.

50. The conduct of defendants Barry Haley and Gaye Luber as described in this complaint has caused plaintiff to suffer severe emotional distress to plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

51. Because the acts taken toward plaintiff by defendant's [sic] Barry Haley and Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendant's [sic] Barry Haley and Gaye Luber in an amount to punish and make an example of these defendants.

52. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable to plaintiff for the damages caused to plaintiff by the conduct of defendant Gaye Luber.

53. Because the malicious, oppressive and intentional conduct of defendant Gaye Luber was committed when acting within the scope of her employment as Executive Director of LBLA, plaintiff requests that punitive damages be assessed against defendant LBLA under the doctrine of respondent superior.

SIXTH CAUSE OF ACTION
CONSPIRACY - OUTRAGEOUS CONDUCT

54. Plaintiff incorporates by reference paragraphs 1-53, inclusive, of this complaint as if fully set forth here.

55. Acting in concert, defendants Barry Haley and Gaye Luber directed their conduct, as described in this complaint, toward plaintiff in an intentional or reckless manner.

56. The conduct of defendants Barry Haley and Gaye Luber, in causing plaintiff's discharge from her employment in retaliation for plaintiff exercising her right to file a veterans' preference inquiry, was outrageous and intolerable because it offended generally accepted standards of decency and morality.

57. Defendants Barry Haley and Gaye Luber's conduct as described in this complaint was malicious, oppressive and intended to injure plaintiff.

58. The conduct of defendants Barry Haley and Gaye Luber has caused plaintiff to suffer severe emotional distress to plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

59. Because the acts taken toward plaintiff by defendants Barry Haley and Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendant's [sic] Barry Haley and Gaye Luber in an amount to punish and make an example of these defendants.

60. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable to plaintiff for the damages caused to plaintiff by the conduct of defendant Gaye Luber.

61. Because the malicious, oppressive and intentional conduct of defendant Gaye Luber was committed when acting within the scope of her employment as Executive Director of LBLA, plaintiff requests that punitive damages be assessed against defendant LBLA under the doctrine of respondent superior.

WHEREFORE, plaintiff requests judgment against defendants Barry Haley, Gaye Luber, and LBLA, and each of them, as requested above in this complaint, to wit:

1. For compensatory damages, including lost wages, lost employee benefits, vacation benefits, mental and emotional distress and other special and general damages according to proof.

2. For an award of punitive damages against each of the defendants as requested above in this complaint.

3. For an award of costs of suit incurred on all causes of action.

4. For an award to plaintiff of such other and further relief as this court deems just and proper.

Plaintiff hereby demands a trial by jury upon all the issues in the above-entitled action.

/s/ Pat Osborn
Pat Osborn
1474 Paschall Road
Murray, KY 42071
(270) 492-8256
PLAINTIFF, PRO SE

June 11, 2003
Date

I hereby certify the foregoing to be a true copy as filed in the Office of the Trigg Circuit Clerk.

Witness my hand and seal this 30th day of July 2003
Pam W. Perry, Clerk
Trigg Circuit/District Courts

By: [Illegible] D.C.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

PAT OSBORN — PLAINTIFF

v. — CIVIL ACTION NO. 5:03-CV-00192-R

BARRY HALEY, Individually
GAYE LUBER
LAND BETWEEN THE LAKES
ASSOCIATION, INC. — DEFENDANTS

ANSWER

The United States of America, by counsel, states as follows in response to plaintiff's complaint:

ANSWERS TO NUMBERED PARAGRAPHS OF THE COMPLAINT

Parties and Jurisdiction

1. The federal defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 15, 16, 18, 19, and 20. To the extent a response to any of said paragraphs is deemed required, the allegations are denied.

2. The federal defendant admits the allegations in paragraphs 2, 3, 6, 7, 8, 11, 12, 13 and 14.

3. With regard to paragraph 4, the federal defendant admits that the Land Between the Lakes Association, Inc. ("LBLA") has its principal place of business in Trigg County, Kentucky. The federal defendant is without knowledge or information sufficient to form a belief as to

whether LBLA is a Kentucky corporation. In its answer, LBLA stated it is not a Kentucky corporation.

4. With regard to paragraph 5, the federal defendant admits that plaintiff alleges that certain actions occurred in Trigg County, Kentucky. The remainder of the allegations in said paragraph are denied.

5. The federal defendant denies the allegations in the first sentence of paragraph 9. The remainder of the allegations in said paragraph are admitted.

6. The allegations in paragraph 10 are admitted, except that the federal defendant denies that a position was re-advertised.

7. The federal defendant admits the allegations in the first sentence of paragraph 17. With respect to the second sentence, the federal defendant admits that Mr. Kuenzli advised that plaintiff filed a written veterans' preference inquiry with the Department of Labor. All remaining allegations in paragraph 17 are denied.

First Cause of Action

8. Paragraph 21 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

9. The federal defendant denies the allegations in paragraphs 22, 23, and 26.

10. The federal defendant denies the allegations in paragraph 24, except that it appears that defendant Luber was acting within the scope of her employment when she discharged plaintiff.

11. The allegations in paragraph 25 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

Second Cause of Action

12. Paragraph 27 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

13. The federal defendant denies the allegation in paragraph 28 on the basis that "employment relationship" is vague and ambiguous. The federal defendant admits that it knew plaintiff was an employee of LBLA.

14. The federal defendant denies the allegations in paragraphs 29, 30, and 31.

Third Cause of Action

15. Paragraph 32 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

16. The federal defendant denies the allegations in paragraphs 33, 34, 35, 36 and 37.

17. The allegations in paragraph 38 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

Fourth Cause of Action

18. Paragraph 39 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

19. The federal defendant denies the allegations in paragraphs 40, 41, 42, 43, and 44.

20. The allegations in paragraph 45 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

Fifth Cause of Action

21. Paragraph 46 is a restatement of prior allegations, which ar answered above. To the extent a response is deemed required, the allegations are again denied.

22. The federal defendant denies the allegations in paragraphs 47, 48, 49, 50, 51, and 52.

23. The allegations in paragraph 53 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

Sixth Cause of Action

24. Paragraph 54 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

25. The federal defendant denies the allegations in paragraphs 55, 56, 57, 58, 59, and 60.

26. The allegations in paragraph 61 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

AFFIRMATIVE DEFENSES

1. The complaint fails to state in whole or in part a claim upon which relief may be granted.

2. The court lacks jurisdiction because the alleged causes of action do not arise under the Constitution, law or treaties of the United States.

3. Plaintiff's claims are barred in whole or in part by the applicable statutes of limitation.

4. The court lacks jurisdiction because plaintiff failed to exhaust administrative remedies before filing suit.

5. Service of process on the United States and its employee Barry Haley is insufficient pursuant to Fed. R. Civ. P. 4(i)(2)(A) and (B).

6. All or some of the claims against federal defendant Barry Haley allege violations of state law to which defendant Haley has absolute immunity, and accordingly the United States must be substituted as the proper party defendant as to said claims pursuant to 28 U.S.C. §§ 2679(b)(1) and 2679(d).

7. To the extent the claims against federal defendant Barry Haley are determined to properly allege violations of federal law or the Constitution of the Untied States, federal defendant Barry Haley is entitled to qualified immunity from said claims.

8. The United States reserves the right to plead and prove additional defenses and affirmative defenses as they become known during discovery and litigation.

WHEREFORE, based on all of the foregoing, the United States requests:

1. That plaintiff's complaint be DISMISSED;

2. That all costs be assessed against plaintiff; and

3. Such other relief as the Court deems just and proper.

Respectfully submitted,

MARK L. MILLER
United States Attorney

/s/ W. Brady Miller
W. Brady Miller
Assistant U.S. Attorney
510 W. Broadway,
10th Floor
Louisville, KY 40202
(502) 582-5166

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 19th day of November, 2003, to the following:

Pat Osborn, Plaintiff Pro Se
1474 Paschall Road
Murray, Kentucky 42071

C. Thomas Miller, Esq.
Whitlow, Roberts, Houston & Straub
300 Broadway, P.O. Box 995
Paducah, Kentucky 42002

/s/ W. Brady Miller
W. Brady Miller
Assistant U.S. Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

PAT OSBORN — PLAINTIFF

v. CIVIL ACTION NO. _____

BARRY HALEY, INDIVIDUALLY
GAYE LUBER
LAND BETWEEN THE
LAKES ASSOCIATION, INC. — DEFENDANTS

CERTIFICATION

I, Monica Wheatley, Acting United States Attorney, Western District of Kentucky, acting pursuant to the provisions of 28 U.S.C. § 2679(d)(2), and by virtue of the authority vested in me by the Appendix to 28 C.F.R. § 15.3 (1990), hereby certify that the Office of the United States Attorney has reviewed the available facts in this matter. On the basis of the information now available to me with respect to the allegations in the complaint, I find that the named federal defendant, Barry Haley, was acting within the scope of his employment with the U.S. Forest Service, at the time of the conduct alleged in the complaint.

/s/ Monica Wheatley
MONICA WHEATLEY
Acting United States Attorney

Aug. 20, 2003
DATE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

PAT OSBORN — PLAINTIFF

v. — CIVIL ACTION NO. 5:03-CV-00192-R

BARRY HALEY, Individually
GAYE LUBER
LAND BETWEEN THE
LAKES ASSOCIATION, INC. — DEFENDANTS

UNITED STATES' MOTION TO DISMISS

The United States moves the court to dismiss the above-styled case as against the federal defendant. In support thereof, the United States submits the following memorandum of law.

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

INTRODUCTION

Plaintiff filed a complaint in this court against defendants Barry Haley, Gaye Luber and the Land Between the Lakes Association, Inc. ("LBLA"), alleging various causes of action related to her discharge from employment at LBLA in June 2002. These causes of action include: interference with employment relationship; conspiracy to wrongfully discharge plaintiff; conspiracy to interfere with employment relationship; outrageous conduct; and conspiracy to commit outrageous conduct. See Complaint, causes of action two through six. All of the foregoing causes of action naming Barry Haley purport to allege state law torts.

ARGUMENT

I. THE UNITED STATES IS THE PROPER DEFENDANT AS TO STATE LAW CLAIMS AGAINST A FEDERAL EMPLOYEE.

Section 6 of the Federal Employees Liability Reform and Tort Compensation Act provides that upon certification by the Attorney General, or his designate, that a federal employee was acting within the scope of his office or employment at the time of the incident out of which a state law claim arises, any civil action arising out of the incident shall be deemed an action against the United States, and the United States of America shall be substituted as sole defendant with respect to those claims. 28 U.S.C. § 2679(d)(1),(2).

As noted above, all of the causes of action plaintiff claims against Forest Service employee Barry Haley sound in tort under state law. Acting U.S. Attorney Monica Wheatley has certified that Forest Service employee Barry Haley acted within the scope of his employment at the time of the conduct alleged in the complaint. The United States has accordingly separately filed a Notice of Proposed Substitution herein to substitute the United States as defendant in this action in place of Forest Service employee Barry Haley.

II. THE UNITED STATES IS IMMUNE FROM SUIT EXCEPT AS IT CONSENTS TO BE SUED.

The United States, as sovereign, is immune from suit except under those circumstances in which it consents to be sued, and the terms of that consent define the court's jurisdiction to entertain the suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Sherwood*, 312

U.S. 584, 586 (1941); *United States v. Dalm*, 494 U.S. 596, *reh'g denied*, 495 U.S. 941 (1990). Where no such consent exists, a district court has no jurisdiction to entertain a suit against the [United States.] *Mitchell*, 445 U.S. at 538.

In short, any waiver of sovereign immunity must be strictly construed in favor of the United States. *Library of Congress v. Shaw* 478 U.S. 310, 318 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686 (1983). The Supreme Court has long held that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S. Ct. 2698, 2702 (1981); *Soriano v. United States*, 352 U.S. 270, 276, 77 S. Ct. 269, 273 (1957); *see also United States v. Kubrick*, 444 U.S. 111, 117-118, 100 S. Ct. 352, 357 (1979); *Munro v. United States*, 303 U.S. 36, 41, 58 S. Ct. 421, 423-424 (1938); *Jaffee v. United States*, 592 F.2d 712 (3rd Cir. 1979), *cert. denied*, 441 U.S. 961, 99 S. Ct. 2406 (1979); *Bledsoe v. Department of Housing Urban Development*, 398 F. Supp. 315, 320 (E.D. Pa. 1975).

Thus, when an action is brought against the United States as to which there has been no waiver of immunity, or where the waiver granted has been conditioned by an exception applicable to that action, the federal court has no jurisdiction.

III. BECAUSE PLAINTIFF FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES UNDER THE FEDERAL TORT CLAIMS ACT, THE COURT HAS NO JURISDICTION OVER HER TORT CLAIMS AGAINST THE UNITED STATES.

The sole jurisdictional basis for a suit against the United States sounding in tort is the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"). The FTCA is the exclusive waiver of sovereign immunity for actions sounding in state law tort against the United States, its agencies and/or officers acting within their official capacity. *Gibson v. Matthews*, 715 F. Supp. 181 (E.D. Ky. 1989), *aff'd*, 926 F.2d 532 (6th Cir. 1991). In order to maintain a lawsuit against the United States under the FTCA, a plaintiff must exhaust her administrative remedies before bringing suit. 28 U.S.C. § 2675(a). Only when the claim has been "finally denied by the agency in writing" or when there has been a "failure . . . to make final disposition of a claim within six months after it is filed" may a plaintiff institute an action in federal court. *Id.*

Exhaustion of administrative remedies is a *jurisdictional* prerequisite and cannot be waived. *McAfee v. 5th Circuit Judges*, 884 F.2d 221 (5th Cir. 1989); *Henderson v. United States*, 785 F.2d 121 (4th Cir. 1986); *Jackson v. United States*, 730 F.2d 808 (D.C. Cir. 1984); *Holloman v. Watt*, 708 F.2d 1399 (10th Cir. 1983); *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97 (2nd Cir. 1981); *Garrett v. United States*, 640 F.2d 24 (6th Cir. 1981); *Allen v. United States*, 517 F.2d 1328 (6th Cir. 1975); *Rallis v. M.P.W. Stone*, 821 F. Supp. 466 (E.D. Mich. 1993); *Moody v. United States*, 585 F. Supp. 286 (E.D. Tenn. 1984), *aff'd.*, 774 F.2d 150 (6th Cir. 1985); *Chodos v. F.B.I.*, 559 F. Supp. 69

(S.D.N.Y. 1982) *aff'd.*, 697 F.2d 289 (2nd Cir. 1982). The Federal Tort Claims Act is a specific congressional exception to sovereign immunity allowing the government to be sued for tortious acts committed by its employees. *Suarez v. United States*, 22 F.3d 1064 (11th Cir. 1994). The circumstances of its waiver must be scrupulously observed and may not be expanded by the courts. *See, e.g., United States v. Kubrick, supra.*

Plaintiff filed no FTCA claim with the Forest Service. Because plaintiff has not presented a claim to the agency, the agency has not "finally denied" the claim, nor has it failed to make final disposition of same. 28 U.S.C. § 2675(a). Thus, plaintiff has not exhausted her administrative remedies, and the Court has no jurisdiction over her tort claims against the United States, and accordingly should dismiss them.

CONCLUSION

Based upon all of the foregoing, the United States respectfully requests that the court grant its motion to dismiss the above-styled action.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

/s/ W. Brady Miller

W. Brady Miller
Assistant U.S. Attorney
510 W. Broadway, 10th Floor
Louisville, KY 40202
(502) 582-5166

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 9th day of January, 2004, to the following:

Pat Osborn, Plaintiff Pro Se
1474 Paschall Road
Murray, Kentucky 42071

C. Thomas Miller, Esq.
Whitlow, Roberts, Houston & Straub
300 Broadway, P.O. Box 995
Paducah, Kentucky 42002

/s/ W. Brady Miller
W. Brady Miller
Assistant U.S. Attorney

APPENDIX E

U.S. Department of Labor

Robert A. Kuenzli
Office of the Assistant Secretary
for Veterans Employment
and Training
320 Garrard Street
Covington, KY 41011
(859) 292-6666 Ext. 253
(859) 292-6708 Fax
E-mail: kuenzli-robert@dol.gov

[LOGO]

June 24, 2002

RAVET William J. Bolls, Jr.
Veterans' Employment and Training Service
U.S. Department of Labor
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W., Room 6-T85
Atlanta, Georgia 30303

Re: Patricia Osborn
04-KY-2002-00003-VP

Dear RAVET Bolls:

This is a follow-up letter to our telephone conversation concerning the termination of the above mentioned veteran after I discussed the hiring procedures on Recruitment Notice No.: R860-002-D-02 with the U.S. Department of Agriculture (U.S. Forest Service) for a Contract Specialist Trainee, with Mr. Barry Haley, Business Manager, at Land Between the Lake Recreation Area.

Ms. Osborn worked for the Land Between The Lakes Association (LBLA), which is a partner with the U.S. Forest Service at Land Between The Lakes Recreation Area, as a paid volunteer coordinator.

Ms. Osborn is a 5-point preference veteran and with her experience with Land Between The Lakes and her preference she thought she would be a good chance to be selected for the opening. She applied for the position and on May 20, 2002, she learned she was not selected during a staff meeting with nearly 80 of her peers. Mr. Haley announced at the meeting who was hired. Ms. Osborn was shocked that she would learn that she was not hired in front of her friends and peers without some type of prior notice.

After the announcement Mr. Haley asked if there was any question and Ms. Osborn asked Mr. Haley if it would not have been better to provide her with a letter or phone call prior to announcing her non-selection in front of the whole staff. She states that he agreed that it would have been better.

Later during the staff meeting Mr. Haley was talking about the lack of use for a card system that he designed for employees to provide a Think Card to any employee that they observe doing something incorrectly. This Think Card is suppose to remind that employee not to make the same mistake again. After the talk about the card system, Mr. Haley again asked if there were any questions and Ms. Osborn asked Mr. Haley if he had a Think Card, this caused the group at the staff meeting to have a big laugh.

About a week after the staff meeting incident Ms. Osborn's boss, Ms. Tamara Newkum asked Ms. Osborn to apologize to Mr. Haley for the comment he made at the staff meeting and Ms. Osborn told her boss that she would not apologize to Mr. Haley.

I spoke to Mr. Haley on Monday, June 17, to discuss the position that they filled and was told that the number one person on the cert accepted the position. He continued by

saying that he would have his HR fax a copy of the cert to my office.

After receiving the fax I called Ms. Osborn and explained that it appeared that the posting was handled correctly. Ms. Osborn asked that her complaint be closed.

Later Monday afternoon Ms. Osborn called to tell me that she thinks she may be in trouble with her boss because she received a call from Ms. Newkum telling her to cancel the next days appointments and to meet with her in her office the first thing in the morning.

Tuesday morning Ms. Osborn called me to say that she had been fired and that her boss said that Mr. Haley had demanded Ms. Newkum terminate her for insubordination.

I asked Ms. Osborn what it was that caused the insubordination and she explained that it was the comment she made at the staff meeting to Mr. Haley. Ms. Osborn said that Ms. Newkum didn't want to fire her but that she was told do so.

Ms. Osborn told me later that her evaluations are always raving and that she had never been in trouble. She said that she didn't even get any type of warning for the comment that she maid [sic] in the staff meeting. I told Ms. Osborn that I would make some phone calls and get back with her.

Ms. Osborn told me in her initial complaint that Mr. Haley runs the organization as he sees fit and that he proclaims himself to be "The Master" of hardball who will not be intimidated. Another fact that may assist in this is that Mr. Haley and Ms. Newkum are a [sic] item which is well known at the recreation area. Is this how Mr. Haley forced Ms. Newkum to terminate Ms. Osborn?

There are a lot of unanswered questions here but there is one sure fact, Ms. Osborn is single and out of work. The reason is due to her claim with our agency to determine if her veterans preference rights were violated. My phone call to Mr. Haley caused Ms. Osborn to loose [sic] her job. Now I need some assistance in correcting a situation that I assisted in causing.

I have made numerous phone calls trying to find an agency that might be able to assist Ms. Osborn in this matter and everyone is telling me the same thing, that they can not assist. The VEOA statute does not provide any relief for retaliation and it appears that VETS's hands are tied in a matter such as this.

I know that Ms. Osborn can hire an attorney but keep in mind that she is single and the position she held with LBLA paid very little. Do you have any suggestions that will asset [sic] in correcting this mis-justice?

Please let me know if you have any questions or concerns regarding this situation. Thank you for your time and consideration on this matter.

Sincerely,

Robert A. Kuenzli
Assistant Director

CC: File